Temecula Mechanical, Inc. *and* Plumbers and Pipefitters Local 398, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL–CIO. Cases 21–CA–039667 and 21–CA–039834

September 17, 2012

DECISION AND ORDER

BY MEMBERS HAYES, GRIFFIN, AND BLOCK

On May 17, 2012, Administrative Law Judge John J. McCarrick issued the attached decision. The Respondent filed exceptions with supporting argument and the Acting General Counsel filed exceptions and a supporting brief. The Respondent and the Acting General Counsel filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[1]

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Temecula Mechanical, Inc., Temecula, California, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

Insert the following as paragraph 1(d) and reletter the subsequent paragraph.

"(d) Failing to recall employees due to their union and/or protected concerted activities."

Dated, Washington, D.C. September 17, 2012

Brian E. Hayes, Member

Richard F. Griffin, Jr., Member

Sharon Block, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Lisa McNeill, Esq., for the General Counsel.
Thomas Lenz, Esq. and *Kristen Silverman, Esq. (Atkinson, Andelson Loya, Ruud and Romo),* of Cerritos, California, for the Respondent.
Charles Stratton, Organizer, of Los Angeles, California, for the Charging Party.

DECISION

STATEMENT OF THE CASE

JOHN J. MCCARRICK, Administrative Law Judge. This case was tried in Temecula, California, on February 7 and 8, 2012, upon the order consolidating cases, consolidated amended complaint and notice of hearing (complaint) issued on July 29, 2011, by the Acting Regional Director for Region 21.

The complaint alleges that Temecula Mechanical, Inc. (Respondent) violated Section 8(a)(1) and (3) of the Act by creating an impression among its employees that their union activities were under surveillance, by interrogating an employee about union activities, by telling an employee that they were laid off because of their union activities, and by terminating Norman Guardado because of his protected concerted or union activity.

Respondent filed a timely answer to the complaint stating it had committed no wrongdoing.

Upon the entire record, including the briefs from the Counsel for the General Counsel and Respondent, I make the following [1]

FINDINGS OF FACT

I. JURISDICTION

Respondent admitted it is a California corporation with an office and place business located in Temecula, California, where it is engaged as a plumbing and site utility contractor. Annually, Respondent in the course of its business operations

[1] The Respondent suggests that the recess appointments of Members Griffin and Block were not properly constituted and that the Board therefore lacks a quorum to act. For the reasons set forth in *Center for Social Change, Inc.*, 358 NLRB No. 24 (2012), we reject this argument.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We adopt the judge's dismissal of the complaint allegation that the Respondent violated Sec. 8(a)(3) by laying off Norman Guardado on December 17, 2010, because we conclude that the Acting General Counsel failed to prove that the layoff was motivated by antiunion animus.

[4] We shall modify the judge's recommended Order to require the Respondent to cease and desist from failing to recall employees because of their union and/or protected concerted activities.

[1] On July 2, 2009, counsel for the General Counsel filed a motion to correct brief to the Administrative Law Judge. No opposition was filed. The motion is granted.

purchased and received at its Sacramento facility goods valued in excess of $50,000 which originated from points directly outside the State of California.

Based upon the above, Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

Respondent admitted and I find that Plumbers and Pipefitters Local 398, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO (Union) is a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

The Facts

Respondent is a family owned company that specializes in plumbing and site preparation work for public entities. Patrick Leonard is Respondent's owner/president and Pamela Leonard, Patrick's daughter, is Respondent's corporate secretary, project manager, and estimator for bidding jobs.

Norman Guardado worked for Respondent since 2002 as a pipe tradesman. Guardado's wife, Sandra Covarrubias, worked for Respondent as an office clerical since 2007. Guardado and Covarrubias were close friends of Pamela Leonard, they had known each other before Guardado began working for Respondent, they socialized together frequently and Pamela Leonard was the godmother of their child.

The nature of the work Respondent performed for public works jobs entailed site work, pre-slab, and top out work.

Site work, generally performed by pipe tradesmen, included trenching, installation of storm drains, gas, sewer and water lines, and site cleanup. Pre-slab work involves underground plumbing performed inside a building perimeter before the concrete slab is poured. Top out work is plumbing performed in the building walls and ceilings after the slab has been poured. Pre-slab and top out work is performed by apprentices and journeymen plumbers and includes installing gas, water and sewer lines, connecting water heaters, and installing plumbing fixtures.

According to Guardado, during the time he worked for Respondent, while he never participated in an apprenticeship program, he performed both apprentice and journeyman plumbing work that included running pipe for water, gas and sewer lines, installing roof vents, condensation lines, water heaters, and plumbing fixtures. While both Pamela and Patrick Leonard denied that Guardado performed apprentice or journeyman plumbing, their testimony is contradicted by Delgado who worked side-by-side with Guardado on the Banning job for nearly a year. Given Delgado's ability to observe Guardado's work on a daily basis, I credit his testimony. There was no evidence adduced that Respondent ever disciplined Guardado for conduct or work performance problems.

Since most of Respondent's jobs were performed for public entities, prevailing wage law often applied.

In about February 2010, Respondent assigned Guardado to work at its Banning High School jobsite in Banning, California. The Banning High School job was a prevailing wage job. Guardado did both site work and top out work at the Banning job. Guardado worked most of the time with fellow employee Esteban Delgado and Foreman Art Rivera. There were up to seven employees working for Respondent at the Banning jobsite during the period early 2010 to mid-February 2011. The record does not reflect exactly how many employees were working at the Banning jobsite during the period October to December 2010.

Guradado's union activities

Guardado, Delgado, and another of Respondent's employees attended union meetings at the Union's facilities while they were employed at the Banning job. The first meeting took place in October or November 2010. Respondent's employees complained about payments that were not being made by Respondent to their 401(k) accounts and about not being paid wages for the work they were doing. Guardado told the union officials at the meeting what his wages were at the Banning job and what work he was doing. The union officials told Guardado he was not being paid enough for the work he was performing. Another union meeting took place 2 weeks later at the Union's offices in Colton, California. In addition to Guardado and Delgado, Respondent's foreman, Rivera, attended this meeting. Once again Guardado told the union officials the nature of the work he performed for Respondent at the Banning job, that payments were not being made into this 401(k) account, and that health insurance was not being provided. Rivera, Delgado, and Guardado all gave the Union copies of their paystubs from Respondent.

Representatives from Local 398 went to the Banning jobsite and spoke with Respondent's employees two to three times per month in October and November 2010. Local 398 representatives spoke with Guardado and gave him a business card.

After the first union meeting, Local 398 Organizer Charles Stratton called the Piping Industry Progress and Education Trust Fund, P.I.P.E., a trust fund under the auspices of Plumbers Union District Council 16, that prevailing wages are paid on public works projects and requested a certified payroll for Respondent from the Banning public works job.

In about November 2011, Respondent began receiving calls both from Sherri Patton, a labor compliance contractor employed by the Banning Unified School District, and from the Department of Labor concerning payment into employees' 401(k) accounts at the Banning job. Patton advised Respondent that the complaints were coming from an employee at the Banning job where Guardado, Delgado, and Rivera worked. Patton requested a certified copy of Respondent's payroll at the Banning job. The failure to comply with prevailing wage law could result in Respondent's payments being withheld by the Banning Unified School District until there was proof of compliance. According to Covarrubias, Guardado's wife, and admitted by Pamela Leonard, Leonard told Covarrubias she was trying to figure out who caused labor compliance to call Respondent. According to Trina Wellsandt, Respondent's office manager, Pamela Leonard asked Covarrubias if Guardado knew where the complaint came from. Eventually, after Guardado was laid off, Patton made a finding that Respondent had paid Guardado and three other employees outside their classifications on the

Banning jobsite.

The Interrogations of Covarrubias

At about the time union officials began to visit the Banning jobsite in October and November 2010, on an almost daily basis from November to December 2010, Covarrubias said that Pamela Leonard asked her if Guardado had talked to the Union in Banning, if Covarrubias had heard anything about the Union, and, if Covarrubias knew what the Union was doing in Banning. Sometime between October 2010 and January 2011, Covarrubias overheard Pamela Leonard say that she received information from Respondent's employee, Josh Stroud, identifying which of Respondent's employees at a Riverside or Banning jobsite had spoken to the Union. This appears to be the January 10, 2011 information Pamela Leonard received from Stroud. During this period of time Covarrubias told Pamela Leonard that Guardado had given the Union copies of his paystubs. According to Wellsandt, Covarrubias told her in early January 2011 that Guardado was involved with the Union. While Pamela Leonard denies interrogating Covarrubias about the Union or learning from Covarrubias that Guardado gave paystubs to the Union, Leonard admits Covarrubias told Wellsandt that Guardado gave paystubs to the Union. I credit Covarrubias' testimony that Pamela Leonard interrogated her prior to December 17, 2010, about both Guardado's protected concerted union activity given that union officials were present at the Banning job in November and December 2010. Leonard admitted she wanted to know which employees at the Banning job had made complaints to labor compliance and asked Covarrubias who had made such complaints. Given the presence of union agents at the Banning jobsite during the time when Covarrubias says she was interrogated about Guardado's union activity, it is likely that the events occurred as Covarrubias has testified.

The December 17, 2010 Layoff

On December 17, 2010, Guardado was terminated by Respondent's president, Patrick Leonard. During the entire time Guardado worked at the Banning jobsite he carpooled with Delgado who drove since Guardado did not have a driver's license. On December 17, 2010, Delgado and Guardado arrived late to work. They encountered Patrick Leonard at the jobsite trailer who told Guardado they were late and the dailies, reports of work done that day, were incorrect. Guardado said that Delgado prepared the dailies and that he had to carpool with Delgado. Leonard told Guardado that the Company was going down "because of employees like you." He said they were always late and did not do things right. Guardado told Leonard if he did not like it he could fire him on the spot. Both Guardado and Delgado then went to work. Near the end of the workday on December 17, Patrick Leonard told Delgado that he would be finishing the Banning job by himself because he was letting Guardado go. Delgado told Leonard that he hoped Leonard got a replacement since he could not finish the Banning job by himself in 3 weeks. Leonard then went to where Guardado was running condensation lines and told him, "Well, you know, we're kind of slow at work right now and we need to let you go and we don't have any work." Guardado replied, "Pat, . . . what do you mean, we have work. We're not done here. We have other jobs." Leonard said, "Oh, no. We don't have any more work." Guardado left the job and has not returned to work for Respondent.

Back at Respondent's office on December 17, Covarrubias overheard a phone call that was on speaker phone between Patrick and Pamela Leonard. Patrick said he had let Guardado go. Patrik said Guardado was disrespectful and late for work and that was why he was let go. Pamela said, "Well I wish you would have talked to me first." Pamela Leonard then took the call off the speaker phone and Covarrubias could hear no more. Five minutes later Pamela Leonard came out of her office and told Covarrubias that Guardado had been fired. Pamela Leonard said she had sent Guardado a text to call her. Pamela Leonard said that she told her father she "was not laying G off but was going to send Guardado to the Hillcrest jobsite." Pamela Leonard said she called Jason McKeen, Respondent's Hillcrest jobsite foreman, and told him she was sending Guardado to Hillcrest. Pamela Leonard claims she told Covarrubias to tell Guardado to go to Hillcrest. Covarrubias denied she was told to do this by Leonard. Rather, Covarrubias testified that some time before Guardado's layoff Pamela Leonard told her she wanted Guardado to go to work at Hillcrest. I credit Covarrubias. This is consistent with Leonard's testimony that she had always intended to send Guardado to the Hillcrest job which had begun in February 2009 and was completed in December 2011.

December 20, 2010

According to Pamela Leonard, on December 20, she told Covarrubias that Guardado had not gone to the Hillcrest job and Covarrubias said no, he does not want to work with Jason McKeen. (Respondent's Hillcrest jobsite foreman.) Leonard said that Guardado did not call her and Covarrubias replied that Guardado did not want to talk. Guardado testified that if he had been offered work at Hillcrest, despite his differences with McKeen, he would have taken the job because he needed the work. Pamela Leonard admits she saw Guardado in the office on December 20 sometime between 4:30-5 p.m. but, never spoke to him, offered him a job, or asked why he wasn't at Hillcrest. Given the opportunity to speak to an old friend, offer him work at the Hillcrest job, and resolve the dispute her father had created, I find it hard to believe that Covarrubia told Pamela Leonard that Guardado had refused to work at Hillcrest.

December 21, 2010

Even assuming Guardado turned down the work at Hillcrest, the following day, Pamela Leonard told Covarrubias that she still wanted to meet with Guardado. A meeting was scheduled for January 2011.

A few days later, Mary Lou Leonard, Patrick Leonard's wife and Respondent's vice president, spoke with Covarrubias in Respondent's office. Mary Lou told Covarrubias that Patrick let Guardado go. She said "if we bring Guardado back would he come back and Covarrubias said he would." According to Mary Lou Leonard, Covarrubias responded that it was too late since the Union promised Guardado a job as a welder.

January 10, 2011

Despite all of the allegations by Respondent that Guardado

was not interested in working with Respondent, according to Pamela Leonard on January 10, she tried to set up a meeting with Guardado through Covarrubias. Covarrubias informed Leonard that Guardado wanted to meet with her. Meanwhile Pamela Leonard was told by Respondent's employee Stroud that both Delgado and Guardado were Union salts. According to Leonard's testimony at transcript 278, lines 12-18:

> But, at this point, also—see, I had gotten back. This was my first day back. December 10 [sic] was my first day back. So there was a lot going on that day, obviously, with getting that phone call from Josh. (Stroud) So, you know, now the Union was into—it came into play that particular day. And, you know, we—I guess I more so wanted to talk to Norman, (Guardado) but I did not call him personally myself, I never did.

Pamela Leonard admitted that in January 10, 2011, Stroud told her that Guardado and Leonard were salting for the Union. Leonard told Wellsandt to prepare Delgado's final checks. Leonard called the Associated Building Contractors (ABC) and said that Guardado and Delgado were salts for the Union. The ABC representative told Leonard to let Delgado go for lack of work. Leonard said she went to the jobsite and initially told Delgado he was being let go for lack of work, but then admitted she was letting him go because he and Guardado were working for the Union.

January 13, 2011

Pamela Leonard claims that on January 13, after she returned from lunch, Covarrubias told her Guardado had come by to see her with a union business agent. Pamela Leonard says she asked Covarrubias what Guardado wanted to do. Leonard asked if Guardado wanted to talk or to meet. Leonard asked if they were still going to meet and asked Covarrubias if she or Covarrubias should text or call him. Covarrubias replied that she would call Guardado. Later Covarrubias told Leonard that Guardado did not want to meet Leonard because he didn't want to see Leonard cry. Leonard asked if she should call Guardado but Covarrubias said Leonard should give it a little bit of time. (Tr. 273, ll 13-25, 274, ll1-8.) Covarrubias denied that this conversation occurred. I do not credit Leonard's version of this conversation. Pamela Leonard's version is inconsistent with her testimony that on January 10, 2011, Guardado agreed to meet with her but she never made further contact with him after the Union "came into play" on January 10. Leonard's testimony is further internally inconsistent in that Guardado had earlier that day come into Respondent's office to speak with her.

February 3, 2011

Also about a month after Guardado's layoff on about February 3, 2011, he received a phone call from Pamela Leonard while union agent Stratton was visiting. Leonard admitted that she had learned from Covarrubias that a union agent was at Guardado's house. Leonard admitted she then called Guardado and stated that she knew a union agent was at his house. According to Guardado, Leonard asked him what he was saying to the union agent. Leonard admitted she told Guardado "that the Union is at your house today."

February 25, 2011

On February 25, there was a meeting at Respondent's office between Patrick and Pamela Leonard and Delgado. According to Delgado, Pamela Leonard apologized for trying to lay him off. She said they found out it wasn't Delgado but Guardado who was working with the Union. While Patrick Leonard denied this conversation took place, Pamela did not. I credit Delgado's version.

B. The Analysis

The Alleged 8(a)(1) Conduct

Complaint paragraph 7(a) alleges that in December 2010 Pamela Leonard created the impression that employees' union activities were under surveillance.

No evidence was proffered to support this complaint allegation. Accordingly, I will recommend it be dismissed.

Complaint paragraph 7(b) alleges that in December 2010 Pamela Leonard interrogated an employee about the union activities of other employees.

In *Rossmore House,* 269 NLRB 1176, 1177 (1984), the Board established the standard for determining if employer interrogations violate Section 8(a)(1) of the Act. The Board held:

> [T]he basic test for evaluating whether interrogations violate the Act: whether under all of the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act.

The *Rossmore House* test is an objective one and does not rely on the subjective aspect of whether the employee was in fact intimidated. *Multi-Ad Services,* 331 NLRB 1226, 1227–1228 (2000).

In the instant case, Pamela Leonard, who was the *de-facto* chief operating officer of Respondent, in Respondent's offices over a period of 3 months repeatedly interrogated Covarrubias' about Guardado's union and other protected activities, including the filling of a complaint with the Banning School District compliance officer. This interrogation was not innocent brainstorming. The consequences of a violation of prevailing wage laws had serious financial consequences for Respondent including the withholding of payment from the Banning School District. Moreover, as demonstrated in January 2011, Respondent reacted to Delgado and Guardado's union activity by Pamela Leonard's threat to fire Delgado.

On the basis of all of the above facts, I find that Leonard's repeated interrogations of Covarrubias reasonably tended to restrain, coerce, or interfere with both Covarrubias and Guardado's rights guaranteed by the Act and violated Section 8(a)(1) of the Act as alleged. *President Riverboat Casinos of Missouri,* 329 NLRB 77 (1999).

Complaint paragraph 7(c) alleges that on January 2011 Pamela Leonard told an employee that the employee was being laid off because of the employee's union activities.

On January 10, 2011, Leonard was told by employee Stroud that Delgado and Guardado were Union salts. Leonard quickly understood that this meant they worked for the Union and she immediately prepared Delgado's final checks as part of her

intent to fire him. Leonard admits she told Delgado she was going to fire him because he was working for the Union. Such a threat to terminate an employee for engaging in union activities violates Section 8(a)(1) of the Act. *Metro One Loss Prevention Services Group*, 356 NLRB No. 20, slip op. at 14 (2010). I find that in making this threat, Respondent violated Section 8(a)(1) of the Act as alleged.

Complaint paragraph 7(d) alleges that in February 2011 Pamela Leonard created an impression that employees' union activities were under surveillance.

In *Frontier Telephone of Rochester,Inc.*, 344 NLRB 1270, 1276 (2005), the Board defined when an employer creates an impression that its employees union activities are under surveillance:

> In determining whether an employer has unlawfully created the impression of surveillance of employees' union activities, the test that the Board has applied is whether, under all the relevant circumstances, reasonable employees would assume from the statement in question that their union or other protected activities had been placed under surveillance. *Flexsteel Industries*, 311 NLRB 257 (1993); *Schrementi Bros.,* 179 NLRB 853 (1969). The essential focus has always been on the *reasonableness* of the employees' assumption that the employer was monitoring their union or protected [activaties]. As with all conduct alleged to violate Section 8(a)(1), the critical element of reasonableness is analyzed under an objective standard, not the subjective reaction of the individual involved, to determine whether an employer's actions tend to restrain, coerce, or interfere with the Section 7 rights of employees. *KSM Industries*, 336 NLRB 133 (2001); *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992); *El Rancho Market*, 235 NLRB 468, 471 (1978), enfd. mem. 603 F.2d 223 (9th Cir.1979).

On February 25, 2011, Pamela Leonard told Delgado they found out it wasn't Delgado but Guardado who was working with the Union. Delgado was in Respondent's office only to pick up his paycheck. Not only was there no reason to tell Delgado this information but also Leonard failed to tell Delgado the source of her information. As the judge, with Board approval, in *Metro One Loss Prevention*, supra, noted in finding evidence of creating an impression of surveillance at slip op. at 14:

> When an employer tells employees that it is aware of their union activities, but fails to tell them the source of that information, the employer violates Section 8(a)(1). This is because employees are left to speculate as to how the employer obtained its information, causing them reasonably to conclude that the information was obtained through employer monitoring.

The Board applies a broad definition of the term "employee" under Section 2(3) of the Act that includes not only current but prospective and former employees. *Redwood Empire, Inc.,* 296 NLRB 369, 391 (1989).

Here too, I conclude that in telling Delgado that Respondent found out Guardado was working with the Union, without attribution of a source, she created in Delgado's mind the reasonable impression of employer monitoring of employees' union activity in violation of Section 8(a)(1) of the Act, as alleged.

C. The alleged 8(a)(3) Conduct

Complaint paragraph 6 alleges that Respondent laid off employee Norman Guardado on December 17, 2010, and on about February 14, 2011, failed to recall him.

In order to establish a prima facie case that Respondent violated Section 8(a)(3) or (1) of the Act, the Acting General Counsel must show by a preponderance of the evidence that Guardado's protected conduct was a motivating factor in Respondent's decision to lay him off or fail to recall him. In order to establish this, the Acting General Counsel must show protected activity, employer knowledge of that activity, and animus against protected activity. Having established a prima facie case, the burden of persuasion shifts to Respondent to show it would have taken the same action even in the absence of the protected activity. *Landmark Installations, Inc.,* 339 NLRB 422, 425 (2003). If, however, the evidence reflects that Respondent's reasons for terminating or failing to recall Guardado are pretextual, either false or not relied upon, there is no need to perform the second part of the *Wright Line* analysis. *United Rentals, Inc*., 350 NLRB 951 (2007).

In order to establish a discriminatory refusal to hire or rehire violation, the General Counsel must establish that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct, that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination, and that antiunion animus contributed to the decision not to hire or rehire the applicants. Once the General Counsel has met his initial burden for the refusal to consider and refusal to hire, respectively, the burden shifts to the respondent to show that it would not have considered or hired, respectively, the applicants even in the absence of their union activity or affiliation. *Landmark Installations, Inc.,* 339 NLRB supra at 427; *Wayne Erecting, Inc.,* 333 NLRB 1212 (2001).

1. Guardado engaged in both union and protected concerted activities

In *Meyers Industries*, 281 NLRB 882, 885 (1986), the Board adopted the following definition of the term "concerted activities":

> In general, to find an employee's activity to be "concerted," we shall require that it be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.

This definition distinguishes between an employee's concerted activities which, are engaged in with or on the authority of other employees and an employee's non concerted activities engaged in solely by and on behalf of the employee himself.

Here in October and November 2010, Guardado, Delgado, and other employees of Respondent voiced their joint complaints about Respondent's rates of pay, health insurance and 401(k) plan to union officials. During this same period of time,

Guardado and other employees provided the Union with their pay stubs and job duties to verify whether Respondent was paying them according to the work they were performing. Clearly, Guardado's actions involved terms and conditions of employment and his complaints to the Union about these terms and conditions were concerted since they were engaged in with other employees. Since Guardado and the other employees actively sought out the Union's assistance in dealing with their terms and conditions of employment with Respondent, Guardado's actions were also union activities.

2. Respondent's knowledge of Guardado's union or protected concerted activity

In November 2010, the labor compliance officer with the Banning School District advised Respondent that complaints had emanated from employees at the Banning job concerning payment into their 401(k) accounts. From this information Respondent could have inferred that the complaining employee could have been Guardado, Delgado, Rivera, or any one of several other employees who worked at that job. The record is insufficient to establish that Respondent knew that it was Guardado, as opposed to one of the other employees, who was engaged in protected activity in November 2011.

Respondent's interrogations of Covarrubias, including if Guardado had talked to the Union in Banning, if Covarrubias had heard anything about the Union, or if Covarrubias knew what the Union was doing in Banning, suggests that Respondent knew the Union was present at the Banning jobsite but is insufficient to establish that Respondent knew Guardado engaging in union activity.

While Covarrubias testified she told Pamela Leonard that Guardado had given the Union copies of his paystubs, her recollection of the timing of this activity was vague, occurring only sometime in the period November 2010 to January 2011. It is more likely that Covarrubias gave Leonard this information in January 2011, as Wellsandt testified.

That Respondent had no knowledge of Guardado's union or other protected activity prior to December 17, 2010, is more likely in view of Pamela Leonard's reaction to the news that Guardado and Delgado were union activists on January 10, 2011, by immediately deciding to fire Delgado.

However, the record establishes that Guardado was not terminated on December 17, 2010, but rather Pamela Leonard reversed her father's layoff as reflected in her attempt to put Guardado to work at the Hillcrest job as well as by her testimony that she still considered Guardado an employee after December 17. This conclusion is supported by evidence that on December 21 Pamela Leonard set up a meeting with Guardado for January 2011. It is not surprising that there was no further contact with Guardado from December 21 through January 10, 2011, since shortly after December 21 Respondent closed its business due to the holidays and the effects of rain on the jobsites. Further Pamela Leonard was on vacation from December 27 until January 5, 2011. Her first day back at work was not until January 10, 2011. After she returned from her vacation Pamela Leonard still considered Guardado an employee. This is established through her efforts on January 10, 2011, to set up a meeting with Guardado through Covarrubias. Guardado agreed to meet with her. Meanwhile, on January 10, 2011, Pamela Leonard was told by Respondent's employee, Stroud, that both Delgado and Guardado were Union salts.

At this point Respondent demonstrated its hostility towards Delgado and Guardado's union activities. Pamela Leonard admitted she told Delgado she was firing him because of his and Guardado's union activities. Armed with knowledge of Guardado's union activities, Leonard made no further effort to retain Guardado. Respondent's knowledge of Guardado's union activity was corroborated in January 2011 when Covarrubias told Respondent that Guardado had given his pay stubs to the Union. This conclusion is supported by Pamela Leonard's February 25, 2011 statement to Delgado that she found out it wasn't Delgado but Guardado who was working with the Union.

Contrary to Respondent's contention, it had on-going work Guardado was qualified to perform through December 2011 at other jobsites including Hillcrest and Field of Dreams, the record reflects that there was pipe tradesman work at both jobsites. Respondent's defense that it had no work to offer Guardado is a sham. Pamela Leonard admitted she intended to put Guardado to work at the Hillcrest job and that there was work there. She further admitted to Delgado on January 10, 2011, that her initial decision to fire him for lack of work was a fabrication to mask her antiunion animus. Likewise, Respondent's contention that Guardado refused Respondent's work offers is a fabrication as established by Respondent's admission that Guardado agreed to meet with Leonard as late as January 10, 2011, in an effort to retain Guardado until Guardado's union activity trumped friendship. While on December 20, Covarrubias may have said Guardado did not want to work with McKeen, Pamela Leonard made no effort to ask Guardado if this was true, even when Leonard had opportunity to ask Guardado in person on December 20 if he would go to work at Hillcrest. Respondent never offered Guardado work at any other site and at no time did Guardado say he quit his job.

Counsel for the Acting General Counsel has shown, through all of the above, that as of January 10, 2011, Respondent had concrete plans to recall Guardado at the time it learned of his union activity, that Respondent did not recall Guardado, that Guardado had experience and training relevant to the requirements of the available positions and that the January 10, 2011 discovery of Guardado's union and protected-concerted activities was the reason Respondent did not recall him. *FES*, 331 NLRB 9 (2000). I find that Respondent failed to recall Guardado to work after January 10, 2011, in violation of Section 8(a)(1) and (3) of the Act.

Respondent has not otherwise violated the Act and the remaining allegations are dismissed.

Immigration Issue

In its brief, Respondent contends that an informal settlement agreement it signed on September 26, 2011, should be enforced. This issue was disposed of by the Order Denying Motion to Approve Informal Settlement Agreement[2] issued by Associate Chief Administrative Law Judge Cracraft on January

[2] GC Exh. 1(ae).

30, 2012. Judge Cracraft found that Respondent was advised that the settlement agreement Respondent had signed was subject to approval by the NLRB Division of Advice. Later, on November 15, 2011, Respondent was advised that the Division of Advice would not approve the settlement agreement. Further, Respondent's contention that *Mezonos Bakery*, 357 NLRB No. 47 (2011), which holds that back pay cannot be awarded to an undocumented worker, should more properly be addressed at the compliance stage of these proceedings.

CONCLUSIONS OF LAW

1. The Respondent, Temecula Mechanical, Inc., is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. Plumbers and Pipefitters Local 398, United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, AFL-CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act by creating an impression among its employees that their union activities were under surveillance, by interrogating an employee about union activities, and by telling an employee that they were laid off because of their union activities.

4. Respondent has violated Section 8(a)(1) and (3) of the Act by failing to recall employee Norman Guardado.

5. Respondent has not otherwise violated the Act.

6. The unfair labor practices committed by Respondent are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent will be ordered to offer reinstatement to Norman Guardado who it unlawfully refused to recall and make him whole for any wages or other rights and benefits he may have suffered as a result of the discrimination against him in accordance with the formula set forth in *F. W. Woolworth* Co., 90 NLRB 289 (1950), with interest as provided for in *New Horizons for the Retarded,* 283 NLRB 1173 (1987) and *Kentucky River Medical Center,* 356 NLRB No. 8 (2010). enf. denied on other grounds sub.nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended.[3]

ORDER

The Respondent, Temecula Mechanical, Inc., Temecula, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union activities.

(b) Creating the impression that employees' union or other protected concerted activities are under surveillance.

(c) Threatening to fire employees because of their union or other protected concerted activities.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer Norman Guardado immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without loss of seniority or other privileges and make him whole with interest as provided in the remedy section of this Decision.

(b) Remove from its files any reference to the unlawful failure to recall Norman Guardado and notify him in writing that this has been done and that the failure to recall him will not be used against him in any way.

(c) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of back pay due under the terms of this Order.

(d) Within 14 days after service by the Region, post at its facility in Temecula, California, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 1, 2010.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. May 17, 2012

[3] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections shall be waived for all purposes.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

After a trial at which we appeared, argued and presented evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and has directed us to post this notice to employees in both English and Spanish and to abide by its terms.

Accordingly, we give our employees the following assurances:

WE WILL NOT do anything that interferes with these rights.

WE WILL NOT fail to recall employees for engaging in activities protected by Section 7 of the Act.

WE WILL NOT interrogate employees about their union or other protected concerted activities.

WE WILL NOT create the impression that employees' union or other protected-concerted activities are under surveillance.

WE WILL NOT threaten employees with termination for engraining union or other protected–concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL offer Norman Guardado reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position of employment without any loss of rights and benefits, and WE WILL make him whole for any loss of wages or other benefits he may have suffered as the result of the discrimination against him.

WE WILL notify Norman Guardado that we have removed from our files any reference to our refusal to recall him and that the refusal to recall him will not be used against him in any way.

TEMECULA MECHANICAL, INC.